IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Case No. 78-215

FRED STEELE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

CITATIONS

Case Authorities: Page

Constitution:

Statutes:

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Petitioner prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on May 24, 1978, a Motion for Rehearing en banc being denied on July 18, 1978.

I. OPINION OF COURT BELOW

The opinion issued by the Sixth Circuit Court of Appeals on May 24, 1978, is not yet officially reported. The opinion and the Court's order denying the rehearing en banc appear in the Appendix to this Petition for Writ of Certiorari.

II. JURISDICTION

Petitioner Steele was convicted in the United States District Court of an offense under the provisions of 18 USC § 2314. An appeal as of right was filed on behalf of Steele in the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals is sought under the provisions of Supreme Court Rule 19 (1) (b).

III. QUESTION PRESENTED

Is defendant's right to effective assistance of counsel violated when counsel undertakes dual representation of jointly indicated defendants and the trial court fails to advise the defendants of conflict of interest considerations resulting from dual representation so that each defendant might knowingly and intelligently waive his right to effective representation unimpaired by conflict of interest considerations?

IV. CONSTITUTIONAL PROVISIONS

The Sixth Amendment, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

V. STATEMENT OF THE CASE

Steele and a co-defendant were indicted for a violation of 18 USC § 2314.

A single lawyer represented both Steele and the co-defendant from the time of indictment through a trial by jury and sentencing.

The record contains no inquiry by the trial court concerning the dual representation by counsel of jointly indicted defendants.

Counsel for the jointly indicted defendants filed no documents with the Court concerning the dual representation or any waiver of defendants' rights in connection with the dual representation.

VI. BASIS FOR FEDERAL COURT JURISDICTION

Defendant was indicted by a Federal Grand Jury for a violation of 18 USC § 2314 in that he allegedly transported stolen goods in interstate commerce, and the value of said goods were in excess of $5,000.00.

VII. ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

Supreme Court Rule 19, sub-paragraph 1, sub-paragraph b, provides amongst other things that the Court may grant a review on writ of certiorari when it is demonstrated that decisions of the Courts of Appeals are in conflict with one another.

In *Holloway* v. *Arkansas*, Sup. Ct. Case No. 76-5856, decided Apr. 3, 1978, —— US ——, 23 Crim. L. R. 3001, this Court expressly recognized a conflict in the circuits with regard to the affirmative duty of a trial court to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests.

Although this Court recognized the conflict amongst the circuits, it expressly declared the conflict would not be resolved by its decision in *Holloway*.

The DC Circuit, First Circuit Court of Appeals, Third Circuit Court of Appeals, Fourth Circuit Court of Appeals, and Eighth Circuit Court of Appeals all seem to impose on the trial court a mandatory duty to advise jointly indicted defendants represented by a single lawyer of the risks of dual representation so that the record reflects a waiver, knowingly and intelligently made, concerning the defendant's right to representation by counsel unimpaired by conflict of interest considerations. See, *Campbell* v. *U. S.*, 352 F. 2d 359 (CA DC 1965), *U. S.* v. *Foster*, 469 F. 2d 1 (1st CA 1972), *U. S. ex rel. Hart* v. *Davenport*, 478 F. 2d 203 (CA 3rd 1973), *U. S.* v. *Truglio*, 493 F. 2d 574 (4th Cir. 1974), and *United States* v. *Lawriw*, 568 F. 2d 98, (8th CA 1977).

The Sixth Circuit in its opinion dated May 24, 1978, states that the Sixth Circuit declines to follow the precedent

in *United States* v. *Lawriw*, 568 F. 2d 98, decided by the 8th Circuit.

The Sixth Circuit requires a showing of prejudice when there is dual representation by retained counsel. Requiring a showing of prejudice on the record is not a reasonable prerequisite for relief in such proceedings because, as this Court observed in *Holloway*, ". . . joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case, it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable."

VIII. CONCLUSION

Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted because the Sixth Circuit's decision in this case is in conflict with the decisions of other circuits, and this Court should define the scope and nature of the affirmative duty of a trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests.

Respectfully submitted,

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APPENDIX

No. 77-5343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FRED STEELE AND HOWARD R. CHASTEEN, *Defendants-Appellants.*	ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed May 24, 1978.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

PER CURIAM. The defendants, Steele and Chasteen, appeal their convictions for the offense of transporting stolen goods in violation of 18 U.S.C. § 2314. Their major argument on appeal is that the District Court erred by failing to conduct a hearing for the purpose of ascertaining on the record whether the defendants intelligently and voluntarily chose to be jointly represented by the same retained lawyer and by failing to advise the defendants of the potential risks of dual representation.

The defendants were represented by retained counsel of their choice. They argue that we should adopt a *per se* rule under the Sixth Amendment requiring District Judges

to conduct a conflict of interest hearing in all such cases, to advise the defendants of their rights to be represented by separate counsel and to warn them of the dangers of dual representation. We decline to adopt such a rule in cases involving counsel retained by defendants. The defendants in this case have not presented any claim of prejudice or demonstrated that there is a factual basis for a finding of a conflict of interest. We do not believe that in cases of dual representation by retained counsel the Sixth Amendment is violated simply by failure to conduct an inquiry into the possibility of conflicting interests, and we do not read *Holloway* v. *Arkansas,* decided by the Supreme Court, April 3, 1978, (46 U.S.L.W. 4289), as so requiring. We decline to follow the recent Eighth Circuit case, *United States* v. *Lawriw,* 568 F.2d 98 (1977), which adopts a *per se* rule. While we agree that it would be wise for District Courts to conduct a conflict of interest hearing in cases of dual representation by retained counsel, we do not belive that the Sixth Circuit Amendment requires a *per se* rule to this effect. A showing of prejudice is necessary where there is dual representation by retained counsel.

We find no merit in defendant Chasteen's other claims based on the sufficiency of the evidence, the admission of other similar wrongful acts, the District Judge's jury summation and instructions and the length of the sentence imposed.

Accordingly, we affirm the judgment of conviction entered by the District Court.

No. 77-5343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED STEELE AND HOWARD R. CHASTEEN,
Defendants-Appellants.

ORDER

(Filed July 18, 1978)

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

No judge of the Court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN
Clerk

No. 78-215

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED STEELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 576 F.2d 111.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 24, 1978. A timely petition for rehearing *en banc* was denied on July 18, 1978 (Pet. App. 3a). The petition for a writ of

certiorari was filed on August 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the failure of the trial court to make a pretrial inquiry into the possibility of a conflict of interest arising from the joint representation of petitioner and a co-defendant by the same retained attorney requires the reversal of petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of transporting a stolen motor boat, valued at more than $5000, in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. The evidence at trial showed that on April 30, 1976, Lewis Tallman purchased a 1975 Wellcraft Nova 21-foot motor boat from a commercial distributor in Russells Point, Ohio, for more than $8000 (I Tr. 7-8, 65).[1] While the boat was undergoing repairs for certain defects discovered after the sale was completed, it was stolen from the seller's prem-

[1] "I Tr." and "II Tr." designate the two numbered volumes of the trial transcript. "III Tr." designates the transcript volume marked "Transcript of the Testimony of Theodore Venegar, Emma Lerbforth, Glen Edward Dalton, Mary Crowthers and C. Barry Pickett and Sentence Hearing."

ises sometime in late May 1976 (I Tr. 13-14). The boat was not seen again until July 18, 1976, when Tallman spotted it on Lake Cumberland, near Burnside, Kentucky, in the possession of co-defendant Howard R. Chasteen (I Tr. 15-16, 18-19).[2] When a state police officer arrived on the scene, Chasteen produced registration papers indicating that petitioner was the boat's owner (III Tr. 23-24, 32). It appeared that the manufacturer's serial number on the vessel had been altered, and further investigation disclosed that the boat was Tallman's (I Tr. 9-10; III Tr. 28-29, 34).

A female companion of Chasteen testified that she had accompanied Chasteen and petitioner when they transported Tallman's boat from Ohio into Kentucky in May 1976. She stated that at some point after the completion of the trip, petitioner and Chasteen admitted they were aware the boat had been stolen and asked her to assist them in covering up their involvement (III Tr. 37-38, 44-45).

Both petitioner and Chasteen testified in their own behalf. They testified that petitioner had purchased the boat from an individual who had advertised it in a newspaper. The seller, they said, had followed petitioner in a separate vehicle and had towed the boat from a location in Ohio to the vicinity of Lake Cumberland, Kentucky, where petitioner's father owned a cabin. At the time Tallman discov-

[2] Chasteen was tried jointly with petitioner on the interstate transportation of stolen goods charge. He was convicted and sentenced to a five-year term of imprisonment.

ered the boat, they testified, Chasteen was using it with petitioner's permission (II Tr. 203-205, 230-232).

2. Petitioner and Chasteen were represented at trial by the same retained attorney. The district court was not notified that there was any danger that the dual representation could lead to a conflict of interest on the part of defense counsel, and the court did not conduct an inquiry, *sua sponte*, into the possibility of such a conflict. In affirming petitioner's conviction, the court of appeals refused to adopt a *per se* rule requiring district courts to conduct a hearing in all joint representation cases involving counsel retained by defendants, noting that the instant case "[neither] presented any claim of prejudice [nor] demonstrated that there is a factual basis for a finding of a conflict of interest" (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals erred in not adopting and applying in this multiple representation case a *per se* ruling requiring the district court to conduct a conflict of interest hearing for the purpose of ascertaining on the record whether petitioner knowingly and intelligently waived his right to separate representation.

It is well established that a criminal defendant is guaranteed the right to an attorney whose loyalty is not divided between clients with conflicting interests. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). It is equally established that the right to separate counsel, or to any counsel at all, may be waived. See *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975); *Lollar* v. *United States*, 376 F.2d 243 (D.C. Cir. 1967); cf. *Faretta* v. *California*, 422 U.S. 806, 807 (1975). As we pointed out in our brief in opposition in *Lawriw* v. *United States*, No. 77-1065, cert. denied, April 17, 1978, at 8-10,[3] however, the courts of appeals differ regarding the duty of the trial court to advise defendants of the risks associated with sharing counsel and to make inquiry regarding their waiver of the right to be represented separately. See also *Holloway* v. *Arkansas*, No. 76-5856 (April 3, 1978), slip op. 8. While we believe that the preferable course is to encourage or require a pretrial inquiry, the failure of the trial court to conduct such an inquiry *sua sponte* does not, in our view, automatically entitle a convicted defendant to a new trial.

The fact that petitioner and a co-defendant were represented by the same trial attorney does not in itself constitute a constitutional deprivation of counsel. *Holloway* v. *Arkansas*, *supra*, slip op. 7. In cases in which joint representation is alleged as error on appeal, the court must ascertain whether a conflict of interest or prejudice in fact appears, and while "[o]rdinarily, prejudice would be assumed from

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[3] We are forwarding a copy of our brief in *Lawriw* to petitioner's counsel.

the existence of a conflict, * * * a conflict will not be inferred from the fact of joint representation." *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972).

In the instant case, petitioner has made no claim of prejudice whatsoever; he has shown nothing more than the fact of joint representation. Moreover, the facts of this case do not point to any likely source of prejudice from the joint representation. Petitioner and Chasteen presented the consistent, mutually supporting defense that petitioner was the unknowing victim of a fraudulent sales transaction and that Chasteen innocently borrowed the boat with petitioner's permission. Furthermore, the trial record makes it clear that their retained attorney was zealous in his defense of both defendants, having presented defense witnesses and rigorously cross-examined and attempted to impeach the credibility of the government witnesses. Throughout the trial, defense counsel interposed objections and sought to have the jury admonished as to the limited admissibility—as against one or the other of his clients—of certain testimonial evidence. There is no showing—or even any suggestion—that separate counsel might have taken any steps on petitioner's behalf that his trial counsel failed to take because of his duty to petitioner's co-defendant. Finally, unlike the situation in *Holloway* v. *Arkansas*, *supra*, where the appearance of an actual conflict of interest caused the co-defendants to move for separate counsel, the possibility of conflicting interests was at no time raised

by objection, motion, or representations by counsel or the defendants.[4]

Accordingly, while we acknowledge that joint representation of criminal defendants continues to pose vexing and important questions that will one day require the further attention of this Court, we do not believe that this case, in which there is no evidence of any actual conflict of interest, affords a suitable occasion to address these problems.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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SEPTEMBER 1978

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[4] The fact that counsel was retained rather than appointed further supports the conclusion that petitioner's decision to proceed with joint representation was knowing and intelligent. *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 (8th Cir. 1970); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976).

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